



# ACCESS TO PUBLIC RECORDS under the VIRGINIA FREEDOM OF INFORMATION ACT

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## I. STATUTORY GUIDANCE

The Virginia Freedom of Information Act (FOIA) is largely a procedural act, and § 2.2-3704 of the Code of Virginia guides a user as to how to make or respond to a FOIA request for public records. The remainder of this outline breaks down the requirements of § 2.2-3704, and provides practical advice for adhering to FOIA when making or responding to a request. Further detailed guidance regarding charges for the production of records is provided in a separate document entitled "Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act."

### ***WHAT IS A PUBLIC RECORD UNDER FOIA?***

A "public record" is any writing or recording, in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. For example, public records may be in the form of handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media.

### ***ARE DRAFT OR PRELIMINARY VERSIONS ALSO CONSIDERED PUBLIC RECORDS?***

Yes. The definition of "public record" does not distinguish between draft or preliminary versions and final versions, so both are considered public records under FOIA.<sup>1</sup>

## II. MAKING A REQUEST FOR RECORDS

### ***WHO MAY REQUEST RECORDS UNDER FOIA?***

- Citizens of the Commonwealth;
- Representatives of newspapers and magazines with circulation in the Commonwealth; and
- Representatives of radio and television stations broadcasting in or into the Commonwealth.

### ***MUST A REQUEST MENTION "FOIA" SPECIFICALLY?***

No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

### ***MUST A REQUEST BE MADE IN WRITING?***

No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Writing is recourse for both parties!

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<sup>1</sup> FOIA Council Opinion AO-3-00, AO-05-09.



***MAY A PUBLIC BODY REQUIRE A REQUESTER TO FILL OUT A REQUEST FORM?***

No. A public body may develop a request form that it asks requesters to fill out, but a public body may not insist that its form be used before it begins work on a FOIA request. [NOTE: It is suggested that if the requester refuses to fill in the form or to put the request in writing, the public body should fill out its own form—remember, writing is recourse].<sup>2</sup>

***MAY A PUBLIC BODY REQUIRE A REQUESTER TO PROVIDE HIS NAME AND LEGAL ADDRESS?***

Yes. A public body may require a requester to provide his name and legal address before processing a FOIA request. [NOTE: This is a tool a public body *may* use, but FOIA does not mandate that public bodies get identification first.]

**II. RESPONDING TO A REQUEST FOR RECORDS**

***HOW LONG DOES A PUBLIC BODY HAVE TO RESPOND TO A REQUEST?***

A public body must respond within five working days of receipt of the request [NOTE: Count the day **after** receipt as day 1].<sup>3</sup>

**\*REMEMBER:** Failure to respond to a request for records shall be deemed a denial of the request and constitutes a violation of FOIA.<sup>4</sup>

***WHAT ARE THE PERMISSIBLE RESPONSES TO A REQUEST?*** As of July 1, 2007, a public body must make one of the five responses allowed by FOIA:

1. Provide the requested records to the requester;
2. The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with FOIA;
3. The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with FOIA;
4. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body;  
or
5. It is not practically possible to provide the requested records **OR** to determine whether they are available within the five-work-day period, and the public body

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<sup>2</sup> FOIA Council Opinion AO-18-04.

<sup>3</sup> FOIA Council Opinion AO-34-01, AO-47-01, AO-05-06, AO-02-08, AO-07-08.

<sup>4</sup> FOIA Council Opinions AO-10-02, AO-12-03, AO-18-03, AO-01-08, AO-07-08.



needs an additional seven work days in which to provide one of the four preceding responses.<sup>5</sup>

### ***WHEN DOES A RESPONSE NEED TO BE IN WRITING?***

If any part of the answer is "NO" (i.e., response #2 OR #3 above), the response **must**:

1. Be in writing;
2. Identify with reasonable particularity the volume and subject matter of withheld records; **and**
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.

If the answer is "we cannot find it" or "it does not exist" (i.e., response #4 above) then the response **must**:

1. Be in writing, **and**
2. **If** the public body knows that another public body has the records may be found, it must provide contact information for the other public body.

If the answer is "we need more time" and the public body would like seven additional working days to respond (i.e., response #5 above), the response **must**:

1. Be in writing, **and**
2. Specify the conditions that make production of the records impossible.

### ***HOW DOES A PUBLIC BODY RESPOND IF A RECORD CONTAINS EXEMPT AND NONEXEMPT INFORMATION?***

Generally, if a record contains exempt and nonexempt information, the public body must release the record, and delete or excise the portion of the record subject to exemption.

### ***MUST A PUBLIC BODY CREATE A RECORD IN RESPONSE TO A FOIA REQUEST?***

Generally, no public body is required to create a new record if the requested record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.<sup>6</sup>

### ***HOW MUCH MAY A PUBLIC BODY CHARGE FOR PRODUCING RECORDS?***

A public body may make reasonable charges for its **actual cost incurred in accessing, duplicating, supplying, or searching for the requested records.** A public body may not charge extraneous or surplus fees unrelated to the production of the records. [**NOTE:** This means that a public body cannot factor in expenses such as overhead or the cost of benefits paid to employees.] Charges for copies must not exceed the actual cost of duplication.

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<sup>5</sup> Prior to July 1, 2007, FOIA permitted four responses to a records request; FOIA Council Opinions AO-1-00, AO-21-01, AO-12-03, AO-18-03, AO-16-04, AO-05-05, AO-05-06, AO-11-07, AO-12-07, AO-03-08, AO-07-08, AO-13-08, AO-01-09.

<sup>6</sup> FOIA Council Opinions AO-11-00, AO-6-01, AO-11-01, AO-35-01, AO-49-01, AO-01-02, AO-03-02, AO-10-02, AO-11-03, AO-04-04, AO-10-04, AO-16-04, AO-05-05, AO-06-05, AO-09-07, AO-11-07, AO-07-08, AO-12-09.



A citizen may request that the public body estimate the cost of supplying the requested records in advance. As mentioned previously, further detailed guidance regarding charges for the production of records is provided in a separate document entitled "Taking the Shock Out of FOIA Charges: A Guide to Allowable Charges under the Freedom of Information Act."<sup>7</sup>

### ***CAN A PUBLIC BODY REQUIRE ADVANCE PAYMENT?***

When a public body determines in advance that the charges for supplying the requested records are **likely to exceed \$200**, it may require the requester to pay a deposit before proceeding with the request. This deposit may not exceed the amount of the advance determination, and the public body must credit it towards the final cost of supplying the records. If a public body asks for the advance deposit, the five-working-day period to respond to the request will be tolled until the deposit is paid.<sup>8</sup>

### ***WHAT CAN A PUBLIC BODY DO IF A REQUESTER DOES NOT PAY FOR RECORDS PROVIDED UNDER FOIA?***

Before responding to a new request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

### ***DO THESE SAME REQUIREMENTS APPLY TO A REQUEST FOR ELECTRONIC RECORDS?***

Yes. Like all other records, regardless of format, a public body may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electronic data processing system or computer database. And like other records, when electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information. The excision of exempt fields from a database is not considered the creation of a new record under FOIA.

A public body must provide electronic records in any medium identified by the requester, if that medium is used by the public body in the regular course of business. If the public body has the capability, this includes the option of posting the records on a website or delivering the records to an e-mail address. A public body is not required to produce records in a format not regularly used by the public body. However, a public body must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and the public body, including the payment of reasonable costs.<sup>9</sup>

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<sup>7</sup> FOIA Council Opinions AO-1-00, AO-21-01, AO-25-01, AO-32-01, AO-39-01, AO-49-01, AO-05-02, AO-10-02, AO-14-02, AO-08-03, AO-20-03, AO-21-03, AO-01-04, AO-04-04, AO-16-04, AO-23-04, AO-06-05, AO-02-07, AO-09-07, AO-06-09.

<sup>8</sup> FOIA Council Opinion AO-21-01, AO-14-02, AO-04-04, AO-16-04, AO-08-09.

<sup>9</sup> FOIA Council Opinions AO-11-00, AO-10-02, AO-11-02, AO-14-02, AO-21-03, AO-05-05, AO-08-09.



## APPENDIX

### Records Exemptions of General Applicability

As of July 2011, FOIA contains over 100 exemptions for records. Although many of these exemptions apply to specific agencies or to very content-specific records, there are several records exemptions of general applicability that may be used by virtually all public bodies. The records exemptions of general applicability are listed below, with the corresponding statutory citation, as a reference tool.

**§ 2.2-3705.1 (1): Personnel.** Provides an exemption for:

Personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any personnel record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

**§ 2.2-3705.1 (2): Attorney-client privilege.** Provides an exemption for:

Written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

**§ 2.2-3705.1 (3): Attorney work product.** Provides an exemption for:

Legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning a matter that is properly the subject of a closed meeting under § 2.2-3711.

**§ 2.2-3705.1 (4): Tests and examinations.** Provides an exemption for:

Any test or examination used, administered or prepared by any public body for purposes of evaluation of (i) any student or any student's performance, (ii) any employee or employment seeker's qualifications or aptitude for employment, retention, or promotion, or (iii) qualifications for any license or certificate issued by a public body.

As used in this subdivision, "test or examination" shall include (a) any scoring key for any such test or examination and (b) any other document that would jeopardize the security of the test or examination. Nothing contained in this subdivision shall prohibit the release of test scores or results as provided by law, or limit access to individual records as provided by law. However, the subject of such employment tests shall be entitled to review and inspect all records relative to his performance on such employment tests.

When, in the reasonable opinion of such public body, any such test or examination no longer has any potential for future use, and the security of future tests or examinations will not be jeopardized, the test or examination shall be made available to the public. However, minimum competency tests administered to public school children shall be made available



to the public contemporaneously with statewide release of the scores of those taking such tests, but in no event shall such tests be made available to the public later than six months after the administration of such tests.

**§ 2.2-3705.1 (5): Closed meetings.** Provides an exemption for:

Records recorded in or compiled exclusively for use in closed meetings lawfully held pursuant to § 2.2-3711. However, no record that is otherwise open to inspection under this chapter shall be deemed exempt by virtue of the fact that it has been reviewed or discussed in a closed meeting.

**§ 2.2-3705.1 (6): Vendor proprietary information.** Provides an exemption for:

Vendor proprietary information software that may be in the official records of a public body. For the purpose of this subdivision, "vendor proprietary software" means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.

**§ 2.2-3705.1 (7): Computer software.** Provides an exemption for:

Computer software developed by or for a state agency, state-supported institution of higher education or political subdivision of the Commonwealth.

**§ 2.2-3705.1 (8): Cost estimates of real property.** Provides an exemption for:

Appraisals and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale or lease.

**§ 2.2-3705.1 (10): Certain personal information.** Provides an exemption for:

Personal information, as defined in § 2.2-3801, including electronic mail addresses, furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. However, access shall not be denied to the person who is the subject of the record.

**§ 2.2-3705.1 (12): Contracts.** Provides an exemption for:

Records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act.

**§ 2.2-3705.1 (13): Account numbers.** Provides an exemption for:



Those portions of records that contain account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body. However, access shall not be denied to the person who is the subject of the record. For the purposes of this subdivision, "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, savings and loan companies or associations, and credit unions.

**§ 2.2-3705.2 (2): Certain engineering and construction plans.** Provides an exemption for: Those portions of engineering and construction drawings and plans submitted for the sole purpose of complying with the Building Code in obtaining a building permit that would identify specific trade secrets or other information the disclosure of which would be harmful to the competitive position of the owner or lessee. However, such information shall be exempt only until the building is completed. Information relating to the safety or environmental soundness of any building shall not be exempt from disclosure. Those portions of engineering and construction drawings and plans that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems submitted for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.), the disclosure of which would jeopardize the safety or security of any public or private commercial office, multi-family residential or retail building or its occupants in the event of terrorism or other threat to public safety, to the extent that the owner or lessee of such property, equipment or system in writing (i) invokes the protections of this paragraph; (ii) identifies the drawings, plans, or other materials to be protected; and (iii) states the reasons why protection is necessary. Nothing in this subdivision shall prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

**§ 2.2-3705.2 (3): Security systems.** Provides an exemption for: Documentation or other information that describes the design, function, operation or access control features of any security system, whether manual or automated, which is used to control access to or use of any automated data processing or telecommunications system.

**§ 2.2-3705.2 (4): Plans to respond to terrorist activity.** Provides an exemption for: Plans and information to prevent or respond to terrorist activity, the disclosure of which would jeopardize the safety of any person, including (i) critical infrastructure sector or structural components; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes or other records; and (iii) engineering or architectural records, or records containing information derived from such records, to the extent such records reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical,



telecommunications or utility equipment and systems of any public building, structure or information storage facility. The same categories of records of any governmental or nongovernmental person or entity submitted to a public body for the purpose of antiterrorism response planning may be withheld from disclosure if such person or entity in writing (a) invokes the protections of this subdivision, (b) identifies with specificity the records or portions thereof for which protection is sought, and (c) states with reasonable particularity why the protection of such records from public disclosure is necessary to meet the objective of antiterrorism planning or protection. Such statement shall be a public record and shall be disclosed upon request. Nothing in this subdivision shall be construed to prohibit the disclosure of records relating to the structural or environmental soundness of any building, nor shall it prevent the disclosure of information relating to any building in connection with an inquiry into the performance of that building after it has been subjected to fire, explosion, natural disaster or other catastrophic event.

**§ 2.2-3705.2 (6): Security of facilities.** Provides an exemption for:

Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure.

**§ 2.2-3705.4 (1): Students.** Provides an exemption for:

Scholastic records containing information concerning identifiable individuals, except that such access shall not be denied to the person who is the subject thereof, or the parent or legal guardian of the student. However, no student shall have access to (i) financial records of a parent or guardian or (ii) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto, which are in the sole possession of the maker thereof and that are not accessible or revealed to any other person except a substitute.

The parent or legal guardian of a student may prohibit, by written request, the release of any individual information regarding that student until the student reaches the age of 18 years. For scholastic records of students under the age of 18 years, the right of access may be asserted only by his legal guardian or parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. For scholastic records of students who are emancipated or attending a state-supported institution of higher education, the right of access may be asserted by the student.

Any person who is the subject of any scholastic record and who is 18 years of age or older may waive, in writing, the protections afforded by this subdivision. If the protections are so waived, the public body shall open such records for inspection and copying.

**§ 2.2-3705.5 (1): Health.** Provides an exemption for:



Health records, except that such records may be personally reviewed by the individual who is the subject of such records, as provided in subsection F of § 32.1-127.1:03.

Where the person who is the subject of medical records is confined in a state or local correctional facility, the administrator or chief medical officer of such facility may assert such confined person's right of access to the medical records if the administrator or chief medical officer has reasonable cause to believe that such confined person has an infectious disease or other medical condition from which other persons so confined need to be protected.

Medical records shall only be reviewed and shall not be copied by such administrator or chief medical officer. The information in the medical records of a person so confined shall continue to be confidential and shall not be disclosed by the administrator or chief medical officer of the facility to any person except the subject or except as provided by law.

Where the person who is the subject of medical and mental records is under the age of 18, his right of access may be asserted only by his guardian or his parent, including a noncustodial parent, unless such parent's parental rights have been terminated or a court of competent jurisdiction has restricted or denied such access. In instances where the person who is the subject thereof is an emancipated minor or a student in a public institution of higher education, the right of access may be asserted by the subject person.

For the purposes of this chapter, statistical summaries of incidents and statistical data concerning patient abuse as may be compiled by the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services shall be open to inspection and copying as provided in § 2.2-3704. No such summaries or data shall include any patient-identifying information.

**§ 2.2-3705.6 (10): Prequalification to bid.** Provides an exemption for:

Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

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